

HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI

AND

HON'BLE SRI JUSTICE G. BHAVANI PRASAD

Writ Appeal No. 953 of 2005

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Between:

M/s. Shivani Engineering Industries, Hyderabad,

Represented by its Managing Partner.

... Appellant.

And

The Andhra Pradesh State Road Transport

Corporation (APSRTC), represented by its

Managing Director & Vice Chairman, Hyderabad

and another.

... Respondents.

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:: ORDER ::

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Counsel for the appellant : Sri T. Jagdish

Counsel for the respondents : Sri V.T.M. Prasad

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January 4, 2006

W.A.No.953 of 2005

Per G.S. Singhvi, CJ.

Article 14 of the Constitution injuncts that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This article embodies the doctrine of equality and ordains the State to treat all similarly situated persons equally. For twenty five years after the commencement of the Constitution, Article 14 was used by the Courts to invalidate the legislative instruments and administrative actions on the ground that the same brings about discrimination between similarly situated persons. The Courts also evolved a subsidiary doctrine of classification for the purpose of upholding the constitutionality of legislative instruments. The width and amplitude of the doctrine of equality enshrined in Article 14 was widened and the matters which were hitherto considered as alien to Article 14 were brought within its ambit by a series of judgments including the often quoted judgments of **Maneka Gandhi v. Union of India**, **Ramana Dayaram Shetty v. International Airport Authority of India**, **Kasturi Lal Lakshmi Reddy vs. State of Jammu and Kashmir**, **Olga Tellis v. Bombay Municipal Corporation** and **Srilekha Vidyarthi v. State of U.P.**. The broad ratio of these decisions is that every state action must be free from arbitrariness, must be fair, must be in public interest and must be informed by reasons. The expanded scope of the doctrine of equality takes within its fold the state action in relation to contracts etc., and by now it must be treated as settled that the state does not have absolute freedom in the matter of entering into contract, grant of largesse, licenses, permits, quotas and, in appropriate cases, the Court can strike down the grant of licence, contract, permit etc., if the decision of the state or its instrumentality/agency is found to be arbitrary. At the same time, the Courts have recognized that in contractual matters the state must have considerable latitude. In **Tata Cellular v. Union of India**, the Supreme Court laid down the following principles:

“(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure”.

In **Raunaq International Ltd., vs. I.V.R. Construction Ltd.** the Supreme Court reviewed some judicial precedents and held:

“The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has

successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

We have prefaced the disposal of this appeal by taking cognizance of the above noted propositions of law because the core issue which arises for determination in this appeal is whether Andhra Pradesh State Road Transport Corporation (for short, 'Corporation') acted arbitrarily and discriminated the appellant in the matter of award of work relating to fabrication of Luxury and Express bus bodies in pursuance of Tender Notice No. 1 of 2004.

The appellant is engaged in the business of bus body building. It has been doing work on behalf of the Corporation for the last thirty years. In pursuance of Tender Notice No.1/2004, the petitioner submitted tender for award of work for fabrication of Luxury and Express bus bodies. 69 other parties also submitted their tenders. After scrutiny, the negotiation committee constituted by the Corporation decided to call the first fifteen lowest tenderers for negotiations. The petitioner was not one of those who were called for negotiations. As a matter of fact, it's tender was not entertained because of non-fulfillment of the condition enumerated in Clause (1) of the Tender Notice, which reads as under:

"Those who are in regular line of fabrication of Luxury and Express bus bodies and have requisite infrastructure facilities to fabricate Hi-Tech buses i.e., 7 tank hot phasphating, Stretch paneling jig, Paint booth, MIG welding etc., only should quote against the Tender."

The appellant challenged the decision of the negotiation committee of the Corporation by filing Writ Petition No.553 of 2005. In the affidavit filed by Shri K. Muralidhar Rao, managing partner of the appellant, it was averred that the decision of the negotiation committee to call only fifteen parties for negotiation was wholly

arbitrary, irrational and discriminatory and violative of Article 14 of the Constitution, because there was no reason to pick out fifteen tenderers for the purpose of negotiations. It was also pleaded that Clause (1) of the Tender Notice was inserted with a view to favour some persons and to exclude majority of the tenderers from the zone of competition and, therefore, the same is liable to be quashed.

In the counter-affidavit filed on behalf of the Corporation, it was averred that the negotiation committee comprising of Financial Advisor, Executive Director (Engg.), Chief Mechanical Engineer (Chasis & Body), Chief Controller of Stores and Deputy Chief Mechanical Engineer (Chasis & Body) had decided to call first fifteen lowest tenderers for negotiations and the appellant was not called because it did not fulfill the condition specified in Clause (1) of the Tender Notice. It was further averred that the impugned condition was incorporated to meet the requirement of Hi-Tech buses. The appellant's allegation that the offending condition was imposed to eliminate some of the bus body fabricators was denied. It was also averred that the petitioner was not issued offer letter because the rates quoted by it were substantially higher than other tenderers. Another plea taken by the respondents was that the petitioner had failed to execute the work awarded to it in the year 2000.

The learned Single Judge repelled the appellant's challenge to Clause (1) of the Tender Notice by recording the following observations:

"Now, it has to be seen that whether the case of the petitioner has been discriminated or the petitioner has been unfairly treated. One of the terms and conditions in the Tender Notification is that the Corporation does not necessarily bind itself to accept the lowest or any other Tender for the whole or part of the requirements mentioned in the tender notice. The decision of the Corporation in deciding the successful tenderers is final and no reasons will be assigned for rejection of tenders.

Therefore, from the above clause, it is clear that the Corporation is at liberty not to accept the lowest quoted tender. It is the case of the respondents that only the first 15 lowest quoted tenderers have been called for negotiations. In deciding a particular number in calling the tenderers for negotiations, it is for the Corporation to take appropriate decision. If it is a case of pick and choose method among the tenderers, then there will not be any difficulty in holding that the decision of the respondents is unfair and discriminatory. If the respondents-Corporation has chosen to limit a particular number of tenderers, who have quoted lowest price, it cannot be said that it is an arbitrary exercise of power so as to eliminate others. Since the

respondents have received 71 tenders in all not only from the State of Andhra Pradesh, but also from outside the State, the Negotiation Committee, constituted by the Chairman and Managing Director seems to have taken a decision to call the first 15 lowest quoted firms for negotiations. Such exercise of power cannot be said to be arbitrary in view of the fact that a large number of bidders have participated in the tender. No mala fides are attributed to the Negotiation Committee to the effect that with a view to favouring some of the firms, the Negotiation Committee acted arbitrarily and unfairly in calling a particular number of firms for negotiations. It is not the case of the petitioner that the firms have been called for negotiations by way of pick and chose method and at the will and pleasure of the respondents-Corporation. Since it is a specific case of the respondents that the first 15 lowest quoted tenderers have been called for negotiations, the question of favouritism does not arise. It is also not the case of the petitioner that he is one of the first 15 lowest quoted tenderers and therefore, his case was discriminated. Though it is stated in the counter affidavit that the petitioner failed to fulfil his promise in pursuance of the supply order on earlier occasion, the same cannot be a ground to reject his case. Since the petitioner does not come within the list of the first 15 lowest quoted tenderers, the action of the respondents-Corporation cannot be said to be unfair towards the petitioner.

One of the challenges made in this writ petition is with regard to the condition No.1 of the Tender Notification which reads as follows:

“Those who are in regular line of fabrication of Luxury and Express bus bodies and have requisite infrastructure facilities to fabricate Hi-Tech buses i.e. 7 tank hot phosphating, Stretch paneling jig, paint booth, MIG welding etc., only should quote against the Tender.”

According to the petitioner, in imposing such restriction, there is no reasonable nexus with the object sought to be achieved. On the other hand, it is the case of the respondents that such condition postulates to have factors to fabricate Express and Luxury buses as the bodies of Express and Luxury buses are of aluminum top and the Hi-tech buses are of M.S. type. The petitioner has not demonstrated how that condition is irrelevant or that there is no nexus with the object sought to be achieved in imposing such a condition. According to the respondents, the said provision offers a fair chance to all firms which have infrastructure facilities to fabricate other Luxury and Express bus bodies or Hi-tech bus bodies. Therefore, it is for the expert committee to take a decision with regard to the fabrication of the Luxury and

Express bus bodies.

Therefore, in my considered opinion, condition No.1 of the tender notification, will not in any manner affect the right of the petitioner since it applies to all the tenderers who have offered their bids and as such there is no discrimination. Clause (1) of the Tender Notification is formulated by the respondents-Corporation to enable the capability of a particular tenderer who is in the regular line of fabrication of Luxury and Express bus bodies. Since it is not a case of unfairly treatment or discrimination, the writ petitioner is not entitled to any relief.”

Sri T. Jagdish, learned counsel for the appellant made strenuous efforts to persuade us to nullify Clause (1) of the Tender Notice by contending that the sole object of incorporating an unreasonable and onerous condition in the Tender Notice was to exclude large number of tenderers from the zone of consideration. He pointed out that as many as 70 persons had applied and submitted their bids in furtherance of the Tender Notice but most of them did not fulfil the condition specified in Clause (1) of the Tender Notice and yet fifteen of them were chosen for negotiations simply because the rates quoted by them were lower. Learned counsel submitted that the decision of the Corporation to short-list fifteen tenderers, which resulted in exclusion of the remaining tenderers from the zone of consideration, is *per se* irrational, arbitrary and discriminatory and the learned Single Judge committed a serious error by rejecting the appellant’s challenge to the impugned condition.

Shri V.T.M. Prasad, learned counsel for the respondents supported the order of the learned Single Judge and argued that the decision of the respondents to incorporate Clause (1) in the Tender Notice cannot be termed as arbitrary because it was uniformly made applicable to all tenderers and only those who fulfilled the conditions were called for the negotiations. Learned counsel emphasized that the appellant has not laid factual foundation for raising the plea that the decision taken by the negotiation committee of the Corporation to call only fifteen tenderers is vitiated due to discrimination. Shri Prasad then submitted that the Court may not invalidate the decision of the negotiation committee because the works have already been allotted to the successful bidders and none of them has been impleaded as party respondent.

We have given serious thought to the arguments of the learned counsel. In our opinion, the learned Single Judge has rightly held that Clause (1) of the Tender

Notice does not suffer from the vice of discrimination. The award/allotment of work for fabrication of Luxury and Express bus bodies clearly fall within the realm of contract and, in our considered opinion, the Corporation was entitled to lay down conditions of eligibility for participation in the process of award of work, as the buses are required by the Corporation for being used for public transportation. It was within the exclusive domain of the Corporation to determine the zone of eligibility for the tenderers who could be considered for award of work relating to fabrication of bus bodies. The condition contained in Clause (1) of the Tender Notice was uniformly made applicable to all tenderers. Therefore, it is not possible to agree with the learned counsel for the appellant that the same was incorporated with a view to favour some persons and to exclude some other persons.

The argument of the learned counsel that the Corporation had arbitrarily chosen fifteen tenderers for the purpose of being invited for negotiation sounds attractive but, in the facts and circumstances of the case, the same cannot be accepted and the award of work by the Corporation for fabrication of bus bodies cannot be nullified because the appellant has not chosen to implead any one of the fifteen tenderers as parties, and without hearing them, the Court cannot adjudicate on the legality of the decision taken by the Corporation.

The suggestive argument made by the learned counsel for the appellant that some ineligible persons were awarded contract also merits rejection because,

- a. the persons to whom the contract is said to have been awarded have not been impleaded as party respondents, and, without hearing them, no order prejudicially affecting their right or interest can be passed; and
- b. even if it is found that the Corporation has awarded contract to some ineligible persons, no relief can be given to the appellant because it is well settled that Article 14 can be invoked for enforcing doctrine of equality and not for compelling a public authority to act illegally.

Article 14 of the Constitution of India which is genus of the doctrine of equality declares that the State shall not deny to any person equality before the law or the equal protection of laws within the territory of India. In the last 55 years, the Courts have given different dimensions to the doctrine of equality so as to bring every arbitrary action of the State and its functionaries within the ambit of the Court's

power of judicial review. The ever expanding horizon of the equality clause has also encouraged filing of large number of petitions in which the petitioners seek relief solely on the premise that in the case of some other person the public authority has given relief. Till recently, the Courts had enforced equality clause and entertained the claim of such petitioners without going into the question whether the action taken by the State and/or public authority in the other case or order passed in favour of some other person is in consonance with law. But this trend has been reversed by the judgments of the Supreme Court in **Chandigarh Administration v. Jagjit Singh**, AIR 1995 SC 705, **Secretary, Jaipur Development Authority v. Daulat Mal Jain**, (1997) 1 SCC 35, **Gursharan Singh v. New Delhi Municipal Committee**, (1996) 2 SCC 459, **Faridabad CT. Scan Centre v. D.G. Health Services**, (1997) 7 SCC 752 and **Style (Dress land) v. Union Territory, Chandigarh**, (1999) 7 SCC 89.

The facts of Jagjit Singh's case were that the respondents who had given the highest bid for 338 sq. yds plot in Section 31A, Chandigarh defaulted in paying the price in accordance with the terms and conditions of allotment. After giving him opportunity of showing cause, the Estate Officer cancelled the lease of the plot. The appeal and the revision filed by him were dismissed by the Chief Administrator and Chief Commissioner, Chandigarh respectively. Thereafter, the respondent applied for refund of the amount deposited by him. His request was accepted and the entire amount paid by him was refunded. He then filed a petition for review of the order passed by the Chief Commissioner, which was dismissed. However, the officer concerned entertained the second review and directed that the plot be restored to the respondent. The latter did not avail benefit of this unusual order and started litigation by filing writ petition in the High Court, which was dismissed on March 18, 1991. Thereafter, the respondent again approached the Estate Officer with the request to settle his case in accordance with the policy of the Government to restore the plots to the defaulters by charging forfeiture amount of 5%. His request was rejected by the Estate Officer. He then filed another writ petition before the High Court which was allowed only on the ground that in another case pertaining to Smt. Prakash Rani, Administrator had restored the plot even after her writ petition was dismissed by the High Court. The Chandigarh Administration challenged the order of the High Court by filing petition for special leave to appeal. While reversing the order of the High Court, their Lordships of the Supreme Court observed as under:-

“We are of the opinion that the basis or the principle, if it be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law – but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the petitioner if it is found that the petitioner’s case is similar to the other person’s case. But then why examine another person’s case in his absence rather than examining the case of the petitioner who is present before the court and seeking the relief. It is not more appropriate and convenient to examine the entitlement of the petitioner before the court to the relief asked for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person’s case, which other person is not before the Court nor is his case. In our considered opinion, such a course – barring exceptional situations – would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must

be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises).”

In **Secretary Jaipur Development Authority vs. Daulat Mal Jain** (supra), the Supreme Court held as under:

“The illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalized. In other words, judicial process cannot be abused to perpetuate the illegalities. Article 14 proceeds on the premise that a citizen has legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot be denied of the benefit thereof. Such person cannot be discriminated to deny the same benefit. The rational relationship and legal back-up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some persons derived benefit by illegality and had escaped from the clutches of law, similar persons cannot plead, nor the Court can countenance that benefit had from infraction of law and must be allowed to be retained. One illegality cannot be compounded by permitting similar illegal or illegitimate or ultra vires acts.”

In **Gursharan Singh v. New Delhi Municipal Committee** (supra), the Supreme Court refused to invoke Article 14 of the Constitution of India for giving relief to the appellant and observed:

“Under Article 14 guarantee of equality before law is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals, others cannot invoke the jurisdiction of the High Court or of the Supreme Court, that the same irregularity or illegality be committed by the State or an authority which can be held to be a State within the meaning of Article 12 of the Constitution, so far such petitioners are concerned, on the reasoning that they have been denied the benefits which have been extended to others although in an irregular or illegal manner. Such petitioners can question the validity of orders which are said to have been passed in favour of persons who were not entitled to the same, but they cannot

claim orders which are not sanctioned by law in their favour on principle of equality before law.”

In **Faridabad CT. Scan Centre v. D.G. Health Services** (supra), the three Judges Bench of the Supreme Court over ruled the earlier decision of the two Judges Bench and held:

“Article 14 cannot be invoked in cases where wrong orders are issued in favour of others. Wrong orders cannot be perpetuated with the help of Article 14 on the basis that such wrong orders were earlier passed in favour of some other persons and that, therefore, there will be discrimination against others if correct orders are passed against them. The benefit of the exemption notification, in the present case, cannot, therefore, be extended to the petitioner on the ground that such benefit has been wrongly extended to others. “

No other point has been argued.

For the reasons mentioned above, we hold that the appellant has failed to make out a case for interference with the order of the learned Single Judge and the appeal is liable to be dismissed. Ordered accordingly.

G.S. SINGHVI, CJ

G. BHAVANI PRASAD, J

January 4, 2006.

Mvb/vtv